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IN THE

Supreme Court of the United States

NATIONAL GEOGRAPHIC SOCIETY, NATIONAL GEOGRAPHIC ENTERPRISES, INC., AND MINDSCAPE, INC.,
Petitioners,

v.

JERRY GREENBERG AND IDAZ GREENBERG,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI FILED IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a reproduction on a CD-ROM of a printed collective work, presented to the user of the reproduction with the articles, photographs, and advertisements in a format identical to the original print publication, falls outside the privilege of 17 U.S.C. § 201(c) merely because the CD-ROM is enabled by a computer program or contains a short audiovisual introduction.

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INTEREST OF THE *AMICI CURIAE*

Amici curiae include the following parties:

Magazine Publishers of America, Inc. (MPA), established in 1919, is the largest association for the consumer magazine industry, representing more than 240 domestic publishing companies with more than 1,400 magazine titles. In weekly, biweekly, and monthly publications, MPA members provide broad coverage of domestic and international news, consumer affairs, law, literature, religion, politics, science, sports, agriculture, industry, and many other topics. MPA has a long and distinguished record of activity in defense of the First Amendment and the copyright laws.

Newspaper Association of America, Inc. (NAA) is a nonprofit organization representing the interests of more than 2,000 newspapers in the United States and Canada. NAA members account for 87 percent of the U.S. daily newspaper circulation and a wide range of non-daily newspapers. One of NAA's key strategic priorities is to advance newspapers' First Amendment interests, including the ability to publish news and information.

Association of American Publishers, Inc. (AAP) is the leading national trade association of the U.S. book and journal publishing industry. AAP members include most of the major commercial book publishers in the United States, as well as many nonprofit publishers, university presses, and scholarly and scientific journals. AAP members publish hardcover and paperback books in every field of interest, as well as computer software, databases, e-books, and other electronic products. AAP members frequently publish anthologies, compilations, and other collective works in print and electronic format.

Advance Publications, Inc. directly or through its subsidiaries, publishes daily newspapers in 22 cities and business journals in 37 cities throughout the United States, as

well as 18 magazines with nationwide distribution and numerous Internet websites.

The Copley Press, Inc. publishes nine daily newspapers in California, Illinois, and Ohio, including *The San Diego Union-Tribune*, and it operates Copley News Service, an international news service. Archives from many of the company's newspapers are available to the public through licenses to a variety of database providers.

Dow Jones & Company, Inc. publishes *The Wall Street Journal*, a national newspaper published each business day; WSJ.com, the largest paid Internet website with more than 550,000 paid subscribers; Dow Jones Newswires, real-time, twenty-four hour newswires distributed electronically to subscribers; *Barron's*, a weekly newspaper of business and finance; and through its Ottaway Newspaper, Inc. subsidiary, nineteen daily and seventeen weekly newspapers.

Forbes Inc. publishes *Forbes Magazine* and several other publications, including *Forbes Global*, *Forbes ASAP*, and *Forbes FYI*. It also owns Forbes.com Inc., a leading Internet media company providing commentary, analysis, tools, and real-time reporting for business and investment leaders.

Gannett Co., Inc. is a news and information company that publishes 98 daily newspapers in the U.S., including *USA Today*, and a number of non-daily publications, including *USA Weekend*, a weekly magazine. Gannett's 100-plus websites include USA TODAY.com. Gannett also owns and operates 22 television stations and a national news service.

Georgia Press Association is a nonprofit corporation comprised of 33 daily newspapers and 118 weekly newspapers published throughout the State of Georgia. It advocates for its members and for the preservation and extension of the public's right to know.

Gruner + Jahr USA Publishing is a leading publisher of magazines including *Inc.*, *Family Circle*, *Rosie*, *Parents*,

Child, *HomeStyle*, *Fitness*, *YM*, and *Fast Company*, and has a total monthly circulation in excess of 15 million readers.

Hachette Filipacchi Magazines, Inc. publishes more than two dozen magazines including *Elle*, *Woman's Day*, *Home*, and *Car and Driver*.

The Hearst Corporation is a diversified, privately held media company that publishes newspapers, consumer magazines, and business publications. Hearst also owns a leading features syndicate, has interests in several cable television networks, produced movies and other programming for television, and is the majority owner of Hearst-Argyle Television, Inc., a publicly held company that owns and operates numerous television broadcast stations.

Morris Communications Corporation is a business corporation based in Augusta, Georgia. It publishes daily and weekly newspapers in Alaska, Arkansas, Florida, Georgia, Kansas, Minnesota, Missouri, Nebraska, Oklahoma, South Carolina, South Dakota, Tennessee, and Texas. It also publishes magazines and books nationally.

The New York Times Company publishes *The New York Times*, a national newspaper with an approximate circulation of 1.5 million during the week and 1.7 million on Sundays, *The Boston Globe*, and 15 regional newspapers. The New York Times Company operates 8 television stations and 2 radio stations. It also operates New York Times Digital, which runs the company's major Internet websites. The New York Times Company licenses its works for use in electronic databases and for CD-ROM projects.

New Yorker Magazine, Inc. publishes *The New Yorker*, a magazine with a weekly worldwide distribution base of over 850,000. The magazine has been published since 1925 and is consistently recognized for its general excellence.

Playboy Enterprises is a brand-driven, international multimedia entertainment company that publishes editions of *Playboy* magazine around the world; operates Playboy and

Spice television networks and distributes programming via home video and DVD globally; licenses the Playboy and Spice trademarks internationally for consumer products; is developing a Playboy-branded, location-based entertainment business anchored by casinos; and operates Playboy.com, a leading men's lifestyle and entertainment website.

Primedia Inc. is a leading provider of targeted content both on-line and in print. Primedia publishes more than 230 magazines, directories, newsletters, and other publications including titles such as *Seventeen*, *New York*, *Chicago*, *Fly Fisherman*, *American Baby*, *Telephony*, and *American Demographics*.

Time Inc. is the largest publisher of general interest magazines in the United States. Its 64 magazines include *Time*, *Fortune*, *Sports Illustrated*, *People*, *Money*, and *Entertainment Weekly*. Time Inc. is a wholly-owned subsidiary of AOL Time Warner Inc.

The Tribune Company is a media industry leader with operations in the major markets of the United States, including eighteen of the top thirty markets. Through television, newspapers, radio, and the Internet, the Tribune reaches eighty percent of U.S. households. Among the newspapers The Tribune Company publishes are *The Chicago Tribune*, *Los Angeles Times*, *Newsday*, *Orlando Sentinel*, and *South Florida Sun-Sentinel*.

All *amici curiae* are publishers, or associations of publishers, of newspapers, magazines, books, or journals. Many have used freelance authors or photographers in creating their collective works.

In the wake of this Court's decision in *New York Times Co. v. Tasini*, 533 U.S. ___, 121 S. Ct. 2381 (2001), The New York Times Company announced that approximately 115,000 articles by 27,000 freelance authors would be deleted from LEXIS/NEXIS and other electronic databases. *See* David D. Kirkpatrick, *The Supreme Court: The Reaction; Publishers Set to Remove Older Articles From Files*, N.Y. Times, June

26, 2001, at A14. Similarly, Time, Inc. announced that its magazines, including *Time* and *Sports Illustrated*, would delete freelance contributions from electronic databases. *See id.* *Amici curiae* believe that many other publishers will follow suit.

Publishers are not only removing freelance contributions from electronic databases; The San Diego Union-Tribune announced that because of the expense and difficulty of identifying potentially infringing articles, it would block electronic access to all of its articles originally published prior to January 1, 2000. Similarly, other publishers such as New Yorker Magazine, Inc. have simply not made their entire historical archives available because of the ambiguities of how courts might interpret Section 201(c).

In its decision in *Tasini*, this Court sought to strike a balance between authors' rights and the rights granted to publishers under Section 201(c). That balance, however, was upset by the Eleventh Circuit's decision in *Greenberg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001), decided without the benefit of *Tasini*. *Greenberg* goes far beyond *Tasini* by creating serious confusion regarding all electronic republications and nearly all revisions and updates of publishers' collective works. Because of the Eleventh Circuit's opinion in *Greenberg*, *amici curiae* face substantial uncertainty if they republish their magazines, newspapers, books, and journals in what is essentially an electronic microform or revise their works by including additional articles, photographs, or drawings. As a result, *amici curiae* anticipate that electronic databases will contain even fewer works than feared at the time of *Tasini*, and that publishers throughout the country may hesitate, for example, to include indices with traditional microfilm or to update encyclopedias.

STATEMENT OF THE CASE[1]

Respondents Jerry and Idaz Greenberg (collectively, the "Greenbergs"), having previously authorized use of their photographs in *National Geographic*, filed this action against Petitioners National Geographic Society, National Geographic Enterprises, Inc., and Mindscape, Inc. (collectively, the "Society") alleging that publication of the same works in CD-ROM collections of *National Geographic* magazine infringed copyrights in those photographs. The district court held that *The Complete National Geographic* constituted a "revision" of the paper copies of *National Geographic* and that the use of the Greenbergs' photographs fell within the privilege to publish a "revision" established under 17 U.S.C. § 201(c). Accordingly, the district court granted summary judgment to the Society and dismissed the copyright counts against it; the Greenbergs appealed.

Fully aware that this Court had granted *certiorari* in *Tasini*,[2] and ruling less than one week before this Court was scheduled to hear oral arguments in *Tasini*, the Eleventh Circuit held that Section 201(c) did not permit the Society to publish an exact, image-based reproduction of its collective

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[1] In accordance with S. Ct. R. 37.6, *amici curiae* state that they and their counsel authored the entirety of this brief and that counsel for neither party authored it in whole or in part. Further, *amici curiae* disclose that other than themselves, their members, or their counsel, no other person or entity made any monetary contribution to the preparation or submission of this brief. In the interest of full disclosure, it is noted that National Geographic Magazine Group, a subsidiary of National Geographic Society, is a member of *amicus curiae*, Magazine Publishers of America. Further, the National Geographic Society Book Division is a member of *amicus curiae*, Association of American Publishers.

[2] On page one of their Supplemental Brief Supporting Defendants/Appellees filed November 15, 2000, many of the *amici curiae* informed the Eleventh Circuit that this Court had granted *certiorari* in *Tasini* on November 6, 2000, and that as a result, it could refrain from construing Section 201(c) pending this Court's decision on the issue.

work in electronic form simply because it contained (1) an enabling, potentially copyrightable computer program and (2) a brief, potentially copyrightable introduction. *Greenberg v. National Geographic Society*, 244 F.3d 1267, 1272 (11th Cir. 2001). Despite the fact that this Court subsequently heard oral arguments regarding the scope of the same Section 201(c) privilege, the Eleventh Circuit thereafter denied the Society's petition for rehearing and rehearing *en banc*.

Written consent to file this Brief of *Amici Curiae* in Support of Petition for Writ of *Certiorari* Filed in Support of Petitioners was granted by Terrence B. Adamson, Executive Vice President of National Geographic Society on behalf of Petitioners and by Norman Davis, Counsel of Record for Respondents. Copies of these consents have been filed and served concurrently with this Brief.

SUMMARY OF THE ARGUMENT

The Court in *Tasini* ruled that the databases at issue in that case were not revisions under Section 201(c). The Court, however, also carefully explained that Section 201(c) would permit a print collective work to be revised as an electronic collective work as long as the context and position of the contributions remained the same. After *Tasini*, therefore, the question one must ask in determining if a republication of a collective work in electronic form is permitted by Section 201(c) is whether "each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented." *Tasini*, 121 S. Ct. at 2384.

The Eleventh Circuit found that *The Complete National Geographic* fit exactly within the criteria which *Tasini* would require of publishers relying on Section 201(c): the context and position of the contributions—including the photographs—remained the same on the CD-ROM as they did in the paper copies of *National Geographic* magazine. *See Greenberg*, 244 F.3d at 1269 ("Every cover, article, advertisement, and photograph appears as it did in the original paper copy of the Magazine."). Because the Eleventh Circuit was unaware that

Tasini would soon hold that just such electronic publications do not violate the copyrights of freelance contributors, however, it did not consider the dispositive nature of its finding. Instead, the court erroneously concluded that the mere addition of a computer program (which of course was necessary for the CD-ROM to operate), and a short introduction, created a "new" collective work that fell outside the Section 201(c) privilege. Yet, all electronic reproductions must utilize a computer program; therefore, the Eleventh Circuit's approach potentially removes all electronic reproductions from the scope of the Section 201(c) privilege, and not merely the types of databases of concern in *Tasini*.

In addition, by focusing on the addition of new copyrightable elements that this Court did not find relevant in *Tasini*, the Eleventh Circuit has, for a separate reason, placed at risk the republication of collective works that contain any amount of freelance materials in any form. As a result, many publishers may be less likely to republish their collective works even in print media, if only because a revised introduction or some similar "new copyrightable element" could place them at risk of exceeding the 201(c) privilege as defined in *Greenberg*.

That such a result would obtain is all the more unwarranted in view of the extraordinary legislative history that explains Congress's intent in enacting Section 201(c). Congress made it crystal clear that articles from a collective work (such as an encyclopedia) could be republished in an updated version containing substantial, independently copyrightable elements. *See* House Report 94-1476 at 123 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5659, 5737; *see also* discussion *infra* pp. 13-14.

The *Greenberg* opinion, however, is not only a premature ruling in derogation of *Tasini* and in conflict with the legislative history behind Section 201(c); *Greenberg* also disrupts the careful balance achieved by Congress between the public's interest in access to creative works and the need for appropriate incentives for authors to create those works.

This Court, therefore, should grant *certiorari* and either reverse or remand the case for consideration in light of *Tasini*.

REASONS FOR GRANTING THE WRIT

Tasini addressed the meaning of the "revision" privilege found in Section 201(c). The Court held that the *form* of reproduction—as independent articles in isolation and without the context of the entire collective work—placed the publications at issue in *Tasini* outside the 201(c) revision privilege because "each article is presented to, and retrievable by, the user in isolation, clear of the context the original print publication presented." *Tasini*, 121 S. Ct. at 2384.

Two of the three databases at issue in *Tasini*—LEXIS/NEXIS and the New York Times OnDisc—stored articles from collective works in a text-only format "without the graphics, formatting, or other articles with which the article was initially published." *Id.* at 2391. While the other database, General Periodicals OnDisc (GPO), showed "each article exactly as it appeared on the original work's pages, complete with photographs, captions, advertisements, and other surrounding materials," *id.* at 2386, a user viewing any particular article would not be presented with "any material published on other pages of the original periodical." *Id.* at 2391. Articles accessed through any of the three databases lacked "links to articles appearing on other pages of the original publication." *Id.* at 2386.

According to the Court in *Tasini*, the "crucial fact" that placed the databases outside the scope of the Section 201(c) privilege was that they "store[d] and retrieve[d] articles separately within a vast domain of diverse texts," rather than presenting each article in context and as part of the entire collective work. *Id.* at 2393. In reaching this conclusion, the Court specifically approved of the current understanding that reproduction of a collective work on microfilm or microfiche qualified for the Section 201(c) privilege. Indeed, the Court described the rationale for this understanding when it explained that "articles appear on microforms, writ very

small, in precisely the position in which the articles appeared in the newspaper." *Id.* at 2391. Therefore, as long as "the user first encounters [an] Article in context," it is immaterial that "the microfilm roll contains multiple editions, and the microfilm user can adjust the machine lens to focus only on [one] Article, to the exclusion of surrounding material." *Id.* For the Court, even the image-based GPO database, which showed each printed page exactly as it originally appeared in the print publication, could not be said to present the articles in context in the same way as an article on microfilm. Although all the pages on which the GPO article appeared may have been visible to the user, pages adjacent to those on which the article appeared were not visible. *See id.*

Significantly, the Eleventh Circuit, ruling without the benefit of the *Tasini* rationale, *expressly found* that *The Complete National Geographic* was, in fact, an exact reproduction of the original print publication falling precisely within the criteria subsequently set out in *Tasini*:

> What the user of the CNG sees on his computer screen, therefore, is a reproduction of each page of the Magazine that differs from the original only in the size and resolution of the photographs and text. Every cover, article, advertisement, and photograph appears as it did in the original paper copy of the Magazine.

Greenberg, 244 F.3d at 1269. Thus, *The Complete National Geographic*, according to the Eleventh Circuit, satisfied *Tasini*'s requirements by presenting each article and photograph to the user in context—in the exact position in which it appeared in the print publication, and with all the content on adjacent pages as well. Whereas articles accessed through any of the three databases of concern in *Tasini* lacked "links to articles appearing on other pages of the original

publication,"[3] *id.* at 2386, articles and photographs in *The Complete National Geographic* are each linked to each other; moreover, each monthly magazine is linked to the issues published immediately before and after it. For example, after reading the last page of an article in *The Complete National Geographic*, the user need only press a button to "flip" to the next page. Similarly, upon reaching the end of the August 1995 issue, the user can "flip" to the next page—the cover of the September 1995 issue.

In sum, the Eleventh Circuit ruled that *The Complete National Geographic* met the precise criteria shortly thereafter imposed by this Court upon electronic works publishers wishing to rely on Section 201(c); it then raised concerns that such publishers could not publish electronic versions of their works *even if* they addressed the problems identified in *Tasini*. Rather, the Eleventh Circuit relied heavily on its conclusion that despite compliance with all the *Tasini* criteria, a work was transformed into a "new" collective work if it included any new copyrightable matter, *see Greenberg*, 244 F.3d at 1273, such as a program that enables the electronic database to operate or a brief introduction to the entire CD-ROM.

The effect of the Eleventh Circuit's decision extends far beyond what this Court intended in *Tasini*. For example, publishers of image-based electronic versions of complete collective works now face confusion about whether their actions violate freelance authors' copyrights: for whether such works are provided through the Internet, on CD-ROM, or by some other computerized means, electronic documents require the use of a program to convert the data into a form

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[3] The *Tasini* Court explained that although *Remembering Jane*, a freelance article by Mary Kay Blakely, began on page 26, the article was not reproduced as part of the collective work or a revision of that collective work, even in an image-based format, because the materials on pages 25 and 27 were not visible. 121 S. Ct. at 2386 n.2, 2391-92.

readable by humans.[4] Moreover, the Eleventh Circuit has disregarded the principle of media neutrality as codified by Congress;[5] no matter how publishers attempt to republish collective works in electronic form, the resulting electronic work will always be subject to challenge as a "new" collective work under Eleventh Circuit law.

The adverse effects of *Greenberg* are not limited to a potential ban of all *electronic* publishing that incorporates works by freelance authors. The Eleventh Circuit, possibly without limiting its reasoning to electronic works, found that the addition to a collective work of other works "themselves the subject matter of copyright" rendered the entire collective work incapable of satisfying the requirements of Section 201(c). *Greenberg*, 244 F.3d at 1273 & n.12. Thus, even non-electronic publications of a collective work containing any independently copyrightable material could fall outside the scope of the Section 201(c) privilege. For example, the Eleventh Circuit's analysis could jeopardize every publishers' privilege of reproducing their collective works on microfilm or microfiche—a privilege specifically recognized by the Court in *Tasini*. 121 S. Ct. at 2391. Because a publication need only contain a single independently copyrightable element to fall outside the Section 201(c) privilege,

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[4] While emphasizing the importance of the copyrightability of the computer program, the Eleventh Circuit failed to explain the precise role that fact played in its analysis. Indeed, the court explicitly refused to describe the program's importance, instead explaining that "we need not decide in this case whether the addition of only the Program would result in the creation of a new collective work." *Greenberg*, 244 F.3d at 1273 n.12.

[5] The Copyright Act was designed for application with changing technology. For example, a work may be copyrightable if it is "fixed in any tangible medium of expression, now known or later developed." *See* 17 U.S.C. § 102(a); *Matthew Bender & Co. v. West Publ'g Co.*, 158 F.3d 683, 702-703 (2d Cir. 1998) (noting that copyright protection does not "depend upon the form or medium in which the work is fixed") (quoting H.R. Rep. No. 94-1476, at 52 (1976)).

microform reproductions that contain independently copyrightable elements such as introductory materials and indices might not be privileged under the Eleventh Circuit's reasoning.

The Eleventh Circuit's interpretation of 17 U.S.C. § 201(c) runs directly contrary to the legislative history explaining that section. An early draft of Section 201(c) gave publishers the right to publish freelance contributions in the original periodicals or "a composite work like that of the publisher." *Discussion and Comments on Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law*, 88th Cong., 1st Sess., Copyright Law Revision, Part 2 (H. Judiciary Comm. Print 1963), at 385. This language led Harriet Pilpel, an experienced literary property attorney who represented freelance authors, to worry that the section, as drafted, was "less favorable than the present law," presumably because it could allow *The Washington Post*, for example, to sell one of its freelance articles for later publication in *The New York Times*, arguably a "like" composite work. *See id.* at 151-52.

Responding to this concern, the Register of Copyrights agreed to clarify the language to refer only to "that particular composite work." *Id.* at 153. Publishers, however, observed that this language might not allow them to republish revisions of their collective works, selecting and discarding freelance contributions as they chose. *Id.* at 261. The Register of Copyrights agreed that this revised language was too restrictive and that the core privilege to which publishers were entitled should include the privilege of reproducing and distributing freelance contributions of "that collective work and any revisions of it." Copyright Law Revision, Part 5, at 9.

After Pilpel pointed out that under this language, a publisher could revise individual contributions, as opposed to the collective work, *id.* at 152, the Register of Copyrights refashioned Section 201(c) to make clear that the "any revision" language authorized any changes to the "particular

collective work" as a whole, but not to the individual contributions. *Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law; 1965 Revision Bill*, 89th Cong., 1st Sess., Copyright Law Revision, Part 6 (H. Judiciary Comm. Print 1965), at 69. This final compromise, mediated by the Copyright Office, yielded the present language of Section 201(c). To clarify the balance finally struck between publishers and freelance authors, the House Report provided the following examples of what publishers could and could not do under Section 201(c):[6]

> Under the language of this clause a publishing company could reprint a contribution from one issue in a later issue of its magazine, and *could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it*; the publisher could not revise the contribution itself or include it in a new anthology or an entirely different magazine or other collective work.

H.R. Rep. 94-1476, at 122-23 (emphasis added).

An examination of the differences between a 1980 edition of an encyclopedia and a 1990 revision of it strikingly exposes the Eleventh Circuit's flawed reasoning that the addition of independently copyrightable material destroys the Section 201(c) privilege. First, many encyclopedia revisions contain independently copyrightable introductory material such as a new introduction, forward, or preface. Indeed, some publishers include such material with every revision. Yet according to the Eleventh Circuit, a new introduction, forward, or preface to the revised encyclopedia could destroy the publisher's Section 201(c) privilege.

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[6] Congress's amplification is approvingly quoted in both *Tasini* and *Greenberg*. *See Tasini*, 121 S. Ct. at 2389; *Greenberg*, 244 F.3d at 1273.

Second, publishers often change the front cover of encyclopedias when revisions are released. While revised covers might simply include non-copyrightable items, such as titles, names, and numbers, they also could include new photographs and drawings that would be independently copyrightable. Under the Eleventh Circuit's view, however, simply adding a photograph to the cover of an otherwise exact printed copy of an encyclopedia could render it a "new" collective work and make it ineligible for the reproduction and distribution privilege under Section 201(c).

Third, and most important, one cannot legitimately argue that Congress expected a 1990 revision of an encyclopedia to contain no new and independently copyrightable contributions that did not appear in the 1980 version. Congress knew that each coming decade, like each decade before it, would include numerous events that would not only be expected to appear in an encyclopedia, but that would have to be included to make the encyclopedia revision useful and complete. In 1981, the world learned of the discovery of AIDS; in 1986, the world watched in horror as the space shuttle Challenger exploded; and in 1989, the world cheered as the Berlin Wall fell. Certainly a 1990 revision of a 1980 encyclopedia would include independently copyrightable articles, photographs, or drawings related to AIDS, the Challenger disaster, and the fall of the Berlin wall—events that occurred since publication of the 1980 version. Yet, according to the legislative history, the inclusion of such "new copyrightable matter" should not prevent the publisher of the 1990 revision from using, without alteration, another author's contribution concerning William Shakespeare or the American Civil War as originally published in its 1980 edition. Rather, this type of use was exactly what Congress envisioned when it explained that a publisher "could reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it." H.R. Rep. 94-1476, at 122-23. Yet, under *Greenberg*, such new material could dissuade publishers from including pre-existing freelance material in the revision.

Finally, *Greenberg* upsets the Constitutional balance between providing appropriate incentives to authors and maintaining public access to works by those authors. This Court's concern that the LEXIS/NEXIS database "effectively overrides the Authors' exclusive right to control the individual reproduction and distribution of each Article," *Tasini*, 121 S. Ct. at 2393, is not present here. The Section 201(c) privilege, as defined by *Tasini*, does not give publishers of collective works the right to republish an individual contribution apart from the collective work's other contributions. Nor does it permit an individual article's inclusion in another publisher's collective work.[7] On the other hand, by transforming Section 201(c) from a "presumed . . . privilege" into a gamble for publishers—one with prohibitively high risks—*Greenberg* will reduce the availability of creative works to the public by subordinating the "cause of promoting broad public availability of literature, music, and the other arts" to private reward. *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156 (1975).

Had the Eleventh Circuit awaited a ruling by this Court concerning Section 201(c), it surely would have recognized that its own express finding—that *The Complete National Geographic* presented the Greenbergs' freelance contributions exactly as they appeared in the print magazine—placed the CD-ROM squarely within the Section 201(c) privilege. Instead of investigating whether independently copyrightable

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[7] Even before *Tasini*, freelance authors who chose to authorize publication in collective works typically retained virtually all their copyrights granted to them by Section 106, including the right to reproduce the work in copies, prepare derivative works, distribute copies of the work, perform the work publicly, and display the work publicly. *See* 17 U.S.C. § 106. For example, a short story author whose work appeared in *The New Yorker* pursuant to Section 201(c) could, in the absence of a license agreement to the contrary, create or authorize the creation of a book or motion picture derived from that story; the author could also combine several of her works and sell them together as a book of short stories.

material appeared somewhere "in" the collective work (or in the case of a computer program, somewhere in connection with it), the Eleventh Circuit would have recognized that Congress intended the Section 201(c) privilege to embrace revisions that included new copyrightable material.

CONCLUSION

The opinion in *Greenberg* eviscerates the Section 201(c) privilege. The adverse consequences predicted by many of the *amici* when *Tasini* was before this Court will be multiplied if *Greenberg* is allowed to stand unmodified. That such a result will come about is especially unfortunate in view of the pains taken by this Court in *Tasini* to preserve a sanctuary for electronic publishing—and in view of the manifest intent of Congress. Through an interpretation of the statute inconsistent with the language and the legislative history, the Eleventh Circuit has brought into question conduct long considered appropriate under Section 201(c)—including republication on microfilm or microfiche of a collective work containing a new forward or the revision of an encyclopedia to reflect history's advance.

This Court should grant *certiorari* and reverse the Eleventh Circuit's decision. At the very least, this Court should grant *certiorari*, vacate the Eleventh Circuit's erroneous decision, and remand the case for consideration in light of this Court's decision in *Tasini*.

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